

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000808-MR

TABITHA FAITH LOWE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 04-CR-003435

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND WINE, JUDGES; AND HENRY, SENIOR JUDGE<sup>1</sup>.

HENRY, SENIOR JUDGE: Tabitha Faith Lowe entered a conditional guilty plea, under the provisions of Kentucky Rules of Criminal Procedure (RCr) 8.09, to two counts of first-degree possession of a controlled substance (cocaine), and one count of possession of marijuana. The basis for her appeal is her contention that the circuit court erred when it denied her motion to suppress the introduction into evidence of drugs seized from Lowe's person and from her residence. We have reviewed the record and the ruling of the circuit court, and, finding no error, we affirm.

<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On May 26, 2004, a confidential informant told Detective William Brown of the Flex Unit of the Louisville Metro Police Department that a person nicknamed "Blue" sometimes sold drugs at a local convenience store. The informant described "Blue" as a tall, light-skinned black male who often wore a blue baseball cap. The informant also told Detective Brown that "Blue's" wife or girlfriend was a young, short, white female with brown hair. With Detective Brown listening, the informant arranged to buy crack cocaine from "Blue" at the convenience store. The informant also gave Detective Brown a description of the vehicle that he believed "Blue" would be driving.

Acting on this information Detective Brown and three other officers set up surveillance of the convenience store. At approximately the agreed time, a vehicle driven by a young woman arrived at the store, and a tall, light-skinned black male wearing a blue baseball cap got out of the vehicle and went into the store. The vehicle the couple arrived in did not match the description of the vehicle the informant had given Detective Brown, but the male occupant closely matched the description of "Blue." The officers exited their vehicles and waited outside the store. When "Blue" came out of the store and saw the plainclothes officers he started back into the store. The officers then approached him, spoke with him and patted him down. They found crack cocaine concealed in his cap. "Blue," whose name turned out to be Saleem Tarig Muhammad, was arrested on several charges including trafficking in cocaine.

Detective Brown and another officer then went to the vehicle Muhammad had arrived in, and talked with Ms. Lowe. She had parked in a handicapped parking spot, and no license plate was displayed on the vehicle. When she was asked for her driver's license and registration she was unable to produce either. The officers then asked her to

step out of the vehicle, and she complied. She gave the officers verbal consent to search her person and the vehicle. As a female officer searched Ms. Lowe, a packet fell from her shorts onto the ground. The packet proved to contain crack cocaine. Detective Brown informed Ms. Lowe that he believed that if her apartment was searched the officers would find more drugs, and that he believed that he would be able to obtain a warrant to search the apartment.

Ms. Lowe then admitted that there were more drugs at the apartment and verbally consented to a search, but said she wanted to show the officers where the drugs were concealed. Upon arriving at the apartment, which was only about two blocks from the convenience store, Ms. Lowe went to a closet and removed a packet of crack cocaine from one of her child's shoes, and gave it to the officers. She signed a consent to search form before the officers began to search the apartment, and when they entered the apartment the officers saw a marijuana cigarette in an ashtray. Ms. Lowe was arrested on several charges and was later indicted on charges including trafficking in cocaine and possession of marijuana.

As a result of plea negotiations Lowe entered a conditional guilty plea to two counts of possession of a controlled substance in the first degree, cocaine, and one count of possession of marijuana, and was sentenced to five years' imprisonment on each of the cocaine counts and twelve months on the marijuana count, all to be served concurrently, and all probated for five years. She reserved the right under RCr 8.09 to appeal the circuit court's denial of her motion to suppress introduction of the drugs into evidence.

Lowe's first argument is that the circuit court erred in denying her suppression motion because the police did not have a sufficient reason to stop and seize her. She claims that neither the informant's tip, nor the officers' observation of her actions at the store, gave the police any reason to suspect her of illegal activity.

When reviewing rulings on motions to suppress evidence, we will not disturb the trial court's factual findings unless they are clearly erroneous. But we review the trial court's application of the law to the facts *de novo*. *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004).

We have reviewed the videotaped record of the suppression hearing. The circuit court's factual findings are supported by the testimony of Detective Brown. If they are supported by substantial evidence, the trial court's findings of fact are not clearly erroneous. RCr 9.78; *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1999).

A brief investigatory stop is justified when the police have a reasonable articulable suspicion that criminal activity may be under way. The level of such suspicion need not rise to the level either of probable cause, or proof of wrongdoing by a preponderance of the evidence. *Nichols v. Commonwealth*, 186 S.W.3d 761, 763 (Ky.App. 2005); *Commonwealth v. Banks*, 68 S.W.3d 347, 350-351 (Ky. 2001). To briefly recap the facts supporting the investigatory stop and search of Lowe, the officers had prior knowledge that Muhammad was frequently accompanied by a female fitting Lowe's description; Muhammad had just exited the vehicle in which Lowe was sitting, and crack cocaine had been found in his cap; Lowe had parked the vehicle illegally; no license plate was visible on the vehicle; and, although the officers had watched her drive the car onto the lot, she was unable to produce either a driver's license or proof of

registration. The officers had more than sufficient reason to briefly detain and question Lowe. There was no error in the circuit court's ruling in this regard.

Lowe's final argument is that, even if the initial stop was reasonable, the warrantless search of her person and house was *per se* unreasonable because the searches did not fall within one of the recognized exceptions to the search warrant requirement. The Commonwealth's response to this argument is that Lowe consented to the search. Consent is indeed one of the exceptions to the requirement for a search warrant. *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky.App. 2004); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) . If consent is given voluntarily it is valid for Fourth Amendment purposes, and voluntariness is a factual question to be determined from all the circumstances. *Commonwealth v. Erickson*, 132 S.W.3d 884, 888 (Ky.App. 2005).

Lowe's claim that her consent was not voluntarily given arises from her statement at the suppression hearing that one of the officers threatened to “toss” or “tear up” her house if she required the police to obtain a warrant. Detective Brown testified that Lowe gave her consent voluntarily and not in response to a threat, that the situation was calm, and that Ms. Lowe was coherent and fully aware of her rights when she gave her consent. The circuit court concluded that Lowe's consent was obtained properly and not under duress. This finding is supported by substantial evidence in the record and is not clearly erroneous, and is therefore conclusive. RCr 9.78; *Taylor v. Commonwealth*, 987 S.W.2d at 305. Lowe's consent to the search was valid, and the search did not violate her constitutional rights.

The ruling of the Jefferson Circuit Court denying the motion to suppress evidence is affirmed.

ALL CONCUR.

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